Bahama Joe's, Inc. *and* **Hotel, Motel, Restaurant Employees and Bartenders Union, Local 737, AFL–CIO.** Case 12–CA–10208

25 June 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 30 June 1983 Administrative Law Judge Julius Cohn issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions except as modified below.

The judge found that prior to the election the Respondent, through its manager, Jeffrey Martin, and its assistant manager, Patrick Dee, violated Section 8(a)(1) of the Act by telling employees that working conditions would deteriorate if the Union were elected. We agree with his findings of violations in all but two of these instances.

First, we disagree with the judge's finding that Martin unlawfully told employees Richard Snell and Vic Peterson that if the Union were present they would no longer be able to come directly to him to arrange for days off or to trade days off with other employees and that instead they would have to go through their union steward to make such arrangements. The judge based his finding on the testimony of Snell and Peterson that Martin made no reference to negotiations during this discussion. The judge discredited Martin's testimony that he responded to Snell's question about trading days in rather indefinite terms. The transcript reveals Martin's version as follows:

> Okay; I think he [Snell] said, if he and Vic wanted to trade a day off, if the union came in, could they still do something like that.
>
> And, I said, "As far as I know, everything's subject to negotiations. If you want to trade a day off, and I'm no longer in charge of making the schedules, you may have to go to your shop steward to get a scheduled day off changed. But I can't tell you what's gonna happen, because I don't know."

The judge cited Martin's failure to refer to negotiations within his affidavit to the Board as indicative of the unworthiness of his testimony and in support of his crediting Snell's and Peterson's version. However, an examination of the record in this case reveals that while Snell maintained that Martin did not say anything about negotiations during this conversation, Peterson was unsure whether Martin made any reference to bargaining affecting such matters. Peterson first stated that he could not remember whether negotiations were alluded to and thereafter admitted that Martin "could have" said that what would happen would depend on the outcome of negotiations. Clearly Peterson's account does not corroborate Snell's testimony. Furthermore, the judge erroneously concluded that Martin's affidavit lacked reference to negotiations. Several pages of the affidavit were admitted into evidence and at pages 5–6 appears the following:

> Snell may have asked me if they could still get the days off they wanted if the union came in. I don't specifically recall him asking me this, but if he had I would have told him that he might have to go through Vickie Franks to get his days off. I told him that my flexibility would depend on what a collective bargaining agreement called for.

This evidence contradicts the judge's conclusion that Martin made no reference to negotiations in his statement to the Board. Given these flaws and omissions in the judge's analysis of the existing evidence on this issue we believe that his conclusions are necessarily erroneous. Therefore in our independent assessment of the testimony and supporting evidence, we find that there is insufficient basis to warrant a finding that Martin stated that in a unionized setting employees would no longer enjoy their right of access to him regarding scheduling days off and trading days off. Accordingly, we reverse the judge's finding of an 8(a)(1) violation.[1]

The second statement which we find the judge erroneously determined to constitute a violation of Section 8(a)(1) concerns Dee's discussion with employees about how benefits might be affected in the presence of a union. According to Snell's credited testimony, the judge found that Dee told a group of employees that the Respondent could drop the vacation checks that they had been receiving in exchange for another benefit wanted by the Union.

[1] Member Dennis is not persuaded that the judge's credibility resolutions should be overruled. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Therefore, she affirms the judge's finding that Manager Martin stated that in a unionized setting employees would no longer be able to come directly to him to schedule days off or to trade days off and that instead they would have to make such arrangements through their union steward. Contrary to the judge, however, Member Dennis concludes that this statement was not an unlawful threat because "it is a 'fact of industrial life' that when a union represents employees they will deal with the employer indirectly, through a shop steward." *NLRB v. Sacramento Clinical Laboratory*, 623 F.2d 110 (9th Cir. 1980), enf. denied in pertinent part to 242 NLRB 944 (1979).

Peterson also testified about this conversation. He had asked Dee specifically about sick benefits to which Dee replied that vacation checks might be taken away if the employees wanted sick benefits. Dee's own version of this discussion was that he probably did not use the word "negotiable" in describing how benefits might be determined in a unionized setting, but that he used the example of sick benefits in exchange for vacation benefits as demonstrative of the give-and-take process of collective bargaining.

The judge cited this possible loss of vacation checks as one of several threats by the Respondent of how benefits would diminish with a union. We do not agree with his assessment. In the context in which Dee's statement was made, the possibility of losing vacation checks was not a threat of a unilateral action by the Respondent in retaliation for the employees choosing union representation, but merely a description of how the negotiation process involves gains and losses and trade offs in a variety of benefit areas. By Snell's own account, Dee referred to the Union's (and by implication the employees') involvement in deciding the relative importance of various benefits. This stands in marked contrast to other statements found to have occurred during the preelection period. Accordingly, we reverse the judge's finding of a violation.

In addition, while we agree with the judge's determination that the Respondent violated Section 8(a)(1) by threatening Victoria Franks' discharge because of her complaints of harassment resulting from her union activities, which threat was overheard by another employee, we hereby amend his Conclusions of Law to reflect more accurately the substance of this violation.

The Conclusions of Law, Order, and notice are modified to reflect our revised findings.

CONCLUSIONS OF LAW

1. The Respondent is an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by:

(a) Threatening employees with reduced benefits should they select the Union as their collective-bargaining representative.

(b) Threatening employees with loss of wage increases, or decreased wage increases, should they select the Union as their representative.

(c) Threatening to discharge employees because of their union activities in the presence of other employees.

(d) Harassing employees by making their job duties more onerous and difficult and overobserving them, because of their union activities.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by discharging Victoria M. Franks because of her union activities.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board Orders that the Respondent, Bahama Joe's, Inc., Sanford, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with lesser benefits should they select Hotel, Motel, Restaurant Employees and Bartenders Union, Local 737, AFL–CIO as their collective-bargaining representative.

(b) Threatening employees with loss of wages or lesser wage increases should they select the Union as their representative.

(c) Threatening to discharge employees because of their union activities in the presence of other employees.

(d) Harassing employees and making their jobs more onerous and overobserving them because of their union activities.

(e) Discharging employees or otherwise discriminating against employees because of their union activities.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Make whole Victoria M. Franks for any loss of earnings or other benefits in the manner set forth in the section of the decision entitled "The Remedy."

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Expunge from its files any reference to the discharge of Victoria M. Franks, and notify her in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against her.

(d) Post at its Sanford, Florida facility copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[2] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten employees that their benefits will get worse should they select Hotel, Motel, Restaurant Employees and Bartenders Union, Local 737, AFL–CIO as their collective-bargaining representative.

WE WILL NOT threaten employees with loss of wages or decreased wage increases should they select the Union as their collective-bargaining representative.

WE WILL NOT threaten the discharge of employees in retaliation for their union activities in the presence of other employees.

WE WILL NOT harass employees by making their jobs more onerous and difficult and overobserving them because of their union activities.

WE WILL NOT discharge or otherwise discriminate against any employee because of that employee's union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you in Section 7 of the Act.

WE WILL make whole Victoria M. Franks by payment to her of backpay plus interest and any other losses she suffered as a result of her discharge.

WE WILL expunge from our files any reference to the discharge of Victoria M. Franks on 24 May 1982 and WE WILL notify her that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel action against her.

BAHAMA JOE'S, INC.

DECISION

STATEMENT OF THE CASE

JULIUS COHN, Administrative Law Judge. This proceeding was tried at Sanford, Florida, on October 18 and 19, 1982. Upon a charge filed by Hotel, Motel, Restaurant Employees and Bartenders Union, Local 737, AFL–CIO (the Union), on May 27, 1982, the Regional Director for Region 12 issued a complaint alleging various violations by Bahama Joe's, Inc. (Respondent), of Section 8(a)(1) and further that Respondent discharged an employee because of her union activities, in violation of Section 8(a)(3) of the Act. Respondent filed an answer denying the commission of unfair labor practices.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. The General Counsel and Respondent submitted excellent briefs which have been considered. On the entire record in the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

Respondent, a Florida corporation, has an office and place of business located in Sanford, Florida, where it is engaged in the operation of a restaurant selling food and beverages. During the 12 months preceding the issuance of the complaint, Respondent derived from its business gross revenues in excess of $500,000, and purchased and received at its facility products, goods, and materials valued in excess of $10,000 directly from points located outside the State of Florida. The complaint alleges, Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent is actually a subsidiary of another corporation whose office is in Daytona Beach, Florida, and which operates a number of restaurants, presumably each being a separate subsidiary. Kent Buckley supervises sev-

eral of these restaurants including the Sanford location involved herein. The manager at Sanford is Jeffrey Martin, and the assistant manager is Patrick Dee.

Victoria Franks, a waitress employed at Sanford, was the principal organizer and activist on behalf of the Union. She called and brought the Union in during February 1982, and as a result of her activity and assistance, the Union filed a petition on March 24 and an election was held on May 19. Thereafter the Union was certified as collective-bargaining representative of the employees of Respondent. During the campaign Franks wore a union button constantly, and Respondent readily concedes that it was aware of her activity on behalf of the Union.

B. *The Alleged 8(a)(1) Violations*

Richard Snell, a kitchen employee, testified that about a month before the election, he had several conversations with Assistant Manager Dee in the kitchen, in the presence of several other kitchen employees, Ricky Washington, Ernest Wilson, and Vic Peterson. Snell said he would ask questions about matters Buckley had told the employees concerning the Union, and stated his own feeling that under the working conditions and treatment by managers which existed, and the benefits the employees had, he personally felt it would be good to have a union. According to Snell, Dee replied that he believed benefits would be worse if the Union came in, giving as an example that if Snell wanted a day off he would have to go to the shop steward. In addition Dee told them that Buckley could drop the vacation checks the employees were receiving in exchange for another benefit wanted by the Union. Dee also said that Buckley could make the waitresses turn in their tips and Respondent would pay them $3.35 an hour instead.

Victor Peterson, another kitchen employee who was present during the discussion with Dee, corroborated the testimony of Snell. He said that he himself asked Dee about sick benefits and that the latter replied to the effect that if they wanted sick benefits, Buckley might possibly take away their vacation checks instead. In his testimony, Dee himself conceded that he may have used this as an example of negotiations, commenting that if he had used the word "negotiable to those guys, they probably don't know what you mean."

Snell also testified to a conversation with Martin a week and a half before the election with the same employees being present. During a discussion about the Union, Snell reminded Martin he had been promised a month before that he could have July 17 off for his sister's wedding. He asked Martin if the Union came in could he still have that day off and Martin replied that he could not because they would be under a union contract and Snell would have to go to the shop steward about the day off. Snell further stated that a month before the election, in a similar conversation with Martin, he asked the latter if employees would be able to trade days off as they had been doing, and Martin replied that once the Union came in, he would have to go to the shop steward who would then present this to Martin. It is undisputed that employees had regularly scheduled days off but normally were able to trade them merely by informing Martin. In his answers, according to Snell, Martin did not refer to a contract or negotiations or bargaining. He merely said that they would have to go to the shop steward. In the conversation a month before the election, Martin also pointed out that the employees had been getting 25- and 50-cent raises, but once the Union came in they would only be getting a 10- or 15-cent raise. Snell further said that at this point Martin looked at Peterson and said if the Union came in, he would not have received a 50-cent raise.

Martin did not deny making statements of this type, but he testified that anything of that nature said by him was framed in the context of all these things being subject to bargaining and good-faith negotiations. For example, he said it was possible Snell could have the promised day off, but if that subject were contained in the contract, it would be also possible that employees would be tied into classifications which did not permit him to use them interchangeably, and he might not be able to consent to days off as he did previously. Neither Snell nor Peterson indicated that Martin's statements were framed in terms of negotiations, nor did Martin himself allude to negotiations in his affidavit.

Martin, in his testimony, conceded he had referred to the 50-cent raise given in the past to Peterson, stating that he might not have gotten it if there was a contract, but rather seniority may be the way to get a raise.

The General Counsel alleges that as a result of the statements by Dee and Martin to the kitchen employees, Respondent violated Section 8(a)(1) in several respects. As to Martin's remarks that employees could not ask him directly for a day off or trade days off, as was the policy, both Snell and Peterson testified that these things were said by Martin without reference to the condition of negotiations, and I credit their testimony in view of Martin's failure to mention negotiations in his affidavit. These statements constitute a "reference to employees' loss of access to management," and are violative of Section 8(a)(1) of the Act. In *Sacramento Clinical Laboratory*, 242 NLRB 944 (1979), the Board concluded that such a statement "is a clear misstatement of employee rights set forth under Section 9(a) of the Act and an unlawful threat of loss of benefits." I find therefore by such statements of Martin, Respondent violated Section 8(a)(1) of the Act.[1]

It is alleged that Respondent further violated Section 8(a)(1) by the statements of Dee to kitchen employees that employees may lose vacation benefits which could be exchanged for another benefit, and similarly with respect to sick leave benefits, and that waitresses may be directed to turn in tips to Respondent and in lieu thereof be paid minimum wage rates. Further violation is alleged by Martin's statement that Peterson would never have received a 50-cent raise through the Union but would more likely obtain something like 10 or 15 cents. These statements are not denied by Dee and Martin but rather it is asserted they were made in the context that all of these matters would depend on the outcome of good-

[1] *Hahn Property Management Corp.*, 263 NLRB 586 (1982); *Cardio Data Systems Corp.*, 264 NLRB 37 (1982).

faith collective bargaining. While the Supreme Court in *Gissel Packing Co. v. NLRB*, 395 U.S. 575, 618 (1969), has set forth an employer's right to be free to communicate to employees his general views and may even make predictions as to the effect of unionization, the Court also noted that these communications may not contain threats of reprisals or promise of the benefits and that predictions must be based on objective facts. In the instant case Respondent has perhaps overstepped the bounds. It cannot cloak itself in the mantle of a statement that all predictions are, in any case, dependent on the outcome of collective bargaining, when its agents have only predicted dismal and dire results flowing from that mechanism. It is clear from Martin's remark that Peterson and other employees could no longer look forward to 50-cent raises but may have to be content with 10 or 15 cents. As to his statements concerning benefits, his references to good-faith collective bargaining do not evoke any hopes since his examples point out only the possibility of loss of benefit. Martin and Dee did not turn to the other side of the coin so as to indicate that there may be a possibility of gain to the employees as a result of the collective-bargaining process. Nor was there any showing that the predictions made have been based on objective facts as no facts were set forth by the managers. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by those statements made by Martin and Dee which contained threats of losses to employees through collective-bargaining procedures, should they select the Union as their representative.

The General Counsel also maintains that Respondent violated Section 8(a)(1) of the Act by harassing Victoria Franks while on her job and further by threatening to discharge Franks in the presence of another employee. As has been previously noted, Franks was the prime union protagonist and also acted as Union observer during the election on May 19. On Friday, May 21, 2 days after the election, shortly before closing time, Franks was talking to another waitress and saying she was happy the Union won the election, when Dee came over and told her she had better get back to work. Franks then went to the kitchen where Dee told her he was sick of hearing her big mouth. Franks asked him why he was harassing her and whether it was because of her activities with the Union. He replied, "Bull shit." In addition, while Franks was finishing up the work, he told her to keep her big mouth shut. In his testimony Dee did not controvert this conversation but he did deny telling Franks to shut up her big mouth. Dee said, regarding this Friday night incident, that he did not discipline Franks because she went back to her work and completed it, and he thought it was all over.

The next night, Saturday, May 22, about 9 p.m., Martin said something to Franks about sweeping. She picked up a broom and started sweeping. Beverly Adams, another waitress, came over and told Franks that Martin was saying Adams was a lousy waitress and ought to look for work elsewhere. Franks stated she then asked Martin if he was harassing Adams because of the Union and he replied no and she should get back to her sweeping. According to Franks, Martin told her to get back to work, he did not want to hear anything more about the Union, and he shook his finger at her. Franks then told Martin that this was not fair, that they were being harassed because of the Union, and if it continued, unfair labor practice charges would be filed. Martin told her to do whatever she wanted. Adams basically corroborated the testimony of Franks concerning this conversation and was perhaps more detailed than Franks. She stated that Martin came up while she and Franks were talking and told Adams to go to the lounge. As she was leaving she heard Martin tell Franks to stay on the clock or get off, but to keep busy. Adams noted that Franks had been sweeping all the time she and Franks were talking. She confirmed that Franks had stated she was going to bring charges against the Company, and had asked Martin whether he was harassing them because of the Union.

I credit both Franks and Adams concerning this conversation. Actually Martin confirmed, in most part, the conversation with Vicky Franks. He said he did tell her to grab a broom and start cleaning up and then later told her to "lets get it going." He also said she asked him why he was harassing them, and he replied that he was not harassing anyone. Martin stated Vicky told him he was harassing them because of the Union and she was going to file charges, and he replied that she should go ahead and file. He then went into the kitchen, but later returned and told Franks he was not harassing anyone, that all he wanted was for her to do her job, and if she wanted to file charges, to go ahead. He said that he did not "want to hear anymore of this stuff about harassing." Martin conceded that Franks was doing her job and that he had no intention of disciplining her.

Adams testified to another incident which occurred the same night about 11 p.m., May 22. Franks had left but Adams remained as one of the closing girls. At that hour she was filling out her tip report by the cash stand. Martin was sitting in a booth across from the cash stand along with Geraldine Lauderbaugh, the head waitress. Dee, who had left earlier that evening, returned. Martin asked him if Franks was giving him any of that harassment noise about the Union because of her union activities. Although Dee replied, Adams stated she could not hear him. Then she heard Martin say that Franks had given him some of that tonight and if she gives Dee any tomorrow, he is to get rid of her, show her the door. Martin said they had to get rid of her that day or on the weekend or Buckley would get rid of her on Monday. Both Martin and Dee denied that this conversation took place and, indeed, insisted Dee was not there at that time of the night. However, as to the latter point, Lauderbaugh testified that at 11 p.m. on May 22, she was sitting in a booth conversing with Martin, when Dee came into the building, stood at the cash stand for a few minutes, and then came over to where she and Martin were talking. Martin asked Dee if he had heard what happened to him regarding Franks. Dee said no he had not, but he, himself, had one with her last night. They interchanged what happened. Then Lauderbaugh said one of the girls came up to her and she had to get up and leave, and she did not hear any more of the conversation.

Based on the corroboration of most of Adams' testimony by Lauderbaugh, I credit both of them. In this connection I note that, while it appears that Lauderbaugh was in the bargaining unit, nevertheless she was head waitress and indicated during her cross-examination that Martin did "generalize" about personnel matters with her. In any case I found Lauderbaugh to be a very credible witness. As to Adams, Lauderbaugh was able to corroborate that Dee and Martin spoke that night, a fact which they had denied. I therefore credit the balance of Adams' testimony that Martin said they would have to get rid of Franks or else Buckley would do so on Monday. As to this, it is also noted Lauderbaugh did not indicate that when she left to attend to other duties the conversation between Martin and Dee had ceased but rather stated that she did not hear anything further because of her departure. Finally, as will be discussed, there was a truthful prediction in Martin's words because Buckley did discharge Franks on Monday.

The next morning Adams called Franks and warned that they were out to get her and would try to fire her that day, Sunday, or Buckley would do it on Monday. She counseled Franks to play it cool. That Sunday, while at work, Dee kept watching Franks more so than usual, according to Franks, and at one point even took some bread and salad off her tray, on the grounds that she was serving too much of those items. All this was done despite admissions by Martin and Dee that Franks had always been a good employee who did her job well.

I find in the circumstances described above that Respondent has violated Section 8(a)(1) of the Act, by reason of the harassment of Franks by its managers during her workday, because of her union activities. These incidents occurred over Friday, Saturday, and Sunday, which were Franks' first workdays after the union election, instigated either by Dee or Martin or both. It has been held that the short interval between an employee's protected activities and the steps taken by the employer against such employee is sufficient to establish a prima facie case. *Union Camp Corp.*, 194 NLRB 933 (1972), enfd. 463 F.2d 1136 (5th Cir. 1972). This timing, in conjunction with the obvious references by Martin to the Union, that he did not want to hear any more about it, and with Dee's prior statement that she should keep her mouth shut concerning the Union, and their carping concerning her talking to other employees during periods when the waitresses were not busy and had habitually talked to one another all add up to the coercive type of harassment which is contrary to the dictates of the Act.

Moreover, Respondent further violated Section 8(a)(1) of the Act by Martin's instruction on Saturday night to Dee to get rid of Franks over the weekend or else it would be done on Monday by Buckley. This constitutes a threat to discharge Franks, uttered within earshot of another employee, Adams. The Board has held that a threat to discharge employees because of their union activities uttered in the presence of another employee, even if unintentionally communicated to such employee, violates Section 8(a)(1). *Viele & Sons*, 227 NLRB 1940 (1977). Respondent has defended against this allegation firstly on the basis that the conversation between Martin and Dee did not take place, a contention I have discredited based on the testimony of Adams as corroborated by Lauderbaugh. It also urges that, even if such conversation did take place, Adams was in such a position near the cash register that she could not have seen Martin and Dee. I have credited the testimony of Adams that she did, indeed, see them, but even if she had not, there is no evidence that she could not have heard what they said. Dee and Martin were obviously in a location where they could have been overheard by other employees such as waitresses in the vicinity, as they were, in part, heard by Lauderbaugh, a unit employee, and accordingly they should have been aware of these possibilities when they spoke. In any case, Respondent's argument is met by the Board's indication that, even if the threat is unintentionally communicated, a violation still exists. *Ford Radio & Mica Corp.*, 115 NLRB 1046 (1956).

C. *The Alleged Violation of Section 8(a)(3) of the Act*

Franks, whose workday begins at 4:30 p.m., testified that on Monday, May 24, she arrived at the restaurant about 3:30 p.m. Franks said she met another waitress, Laverna Fisher, in the restroom who told her that Buckley was there and something might happen. Franks said they were after her and Fisher replied that she should keep cool. After eating, Franks met Jimmy O'Brien, a busman, in the waitress alley and told him there was going to be a union meeting on Wednesday. She said she wanted to hand O'Brien a map with directions to the meeting, but Buckley appeared and snatched the map out of her hand. According to Franks, Buckley told her not to talk about the Union in the restaurant, and she replied that it was her right to speak about the Union, that she was not doing anything wrong, and it was her legal right as long as she was not interfering with anyone's work. She further said Buckley told her she had better not do it and she insisted it was her right. Buckley said she was sick and crazy and to stop it. He then said something to her about getting out and she said she was not going anywhere, that she had not done anything wrong and wanted to go to work but Buckley told her to leave. She also told him that he better not do anything without advice of his attorney, and that he was trying to break up the Union. She said she was going to wait in the bar, but he told the bartender not to serve her, so she just sat there. Franks said she did this because she did not want to walk out. Buckley said he would call the police which he did, and she remained until the policewoman came and asked her to leave.

Buckley stated he had seen Franks talking to Jim, the busboy, whom he had previously told to clean the waitress alley. Franks told Buckley that she was giving Jim directions to the union meeting and he replied that she should not bother Jim while he was working. Buckley said he told Franks to wait in the lounge until she was ready to punch in, and that Jim should continue his cleaning. He then went to the lounge, repeated to Franks that he did not want her to bother anyone while they were working, and then left for his office. Buckley stated he returned a few minutes later and saw Franks, who said she was punching in, and he told her to go ahead.

Buckley said she started to walk to the timeclock but then turned around and told him he was harassing her and asked him why, to which he replied that he was just doing his job. Franks said he was harassing her because she is in the Union and he could not do that, and he should talk to his lawyer. He said she was sick, that he was just doing his regular job, that she should punch in. According to Buckley this kept going round and round with him repeating for her to go to work and she saying he was harassing her, and should talk to his lawyer. Buckley said he was not harassing her, but if she did not go to work, he would terminate her. He claims that she then turned around and said in a loud voice he could not terminate her and she should see a lawyer. He then said, "You are terminated, get out. She said she was not leaving and he said she should either leave or he would call the police. Franks went towards the dining room and was very loud and he kept asking her to leave. He then told Martin to call the police. Meanwhile, Franks went to the lounge but he told the barmaid not to serve her a drink. Buckley said he went to his own office and sat there and never saw her again until she was reinstated to work.

In his testimony, Buckley claimed that the conversation about handing the union map to Jim had nothing to do with his action, because if she had quieted down she would not have been terminated nor, he testified, had the Union anything to do with it. He stated she was insubordinate by telling him he could not terminate her, that he had to talk to his lawyer, and that he was harassing her. He also stated she was real loud and, as she became more excited, she could be heard in the dining room. Buckley also testified he had not talked to Dee before firing Franks, but Martin told him in the morning that Franks claimed he also was harassing her. On the other hand, Buckley said Martin's information did not affect his decision to discharge her. In conclusion, Buckley said he discharged Franks because she would not go to work and leave things alone and continued to holler that he was harassing her.

The exact time of the conversation was not fixed for certain, Buckley having testified at one point that it was at 4:40 p.m., but thereafter stated it must have been about 4:25 p.m., and at another point said it occurred just before she was supposed to punch in.

Fisher, who was working at the time, testified that none of the customers complained to her about loud voices. Lauderbaugh, who witnessed the tail end of the incident, said she had not heard anything unusual before she went to the back of the waitress alley from the dining room. As to the incident with O'Brien, Buckley said it did not affect his decision. Nevertheless, it is fairly well established in the record, particularly from the testimony of Fischer, that solicitations and distribution of material such as Avon products took place on working time, as there were always some periods of slack time during which employees could do these things. O'Brien, incidently, stated that Franks' voice was normal most of the time while talking to Buckley. In the dining room she may have been a little louder than normal, but she was not screaming. O'Brien further stated that Franks did not really bother him in the performance of his work, which involved sweeping the waitress alley at the time.

A synthesis of the testimony regarding the Buckley-Franks incident, which resulted in the latter's discharge, resembles the proverbial tempest in a tea cup. Clearly Buckley did not discharge her for refusing to work; rather he put it on the basis of insubordination. While presumably Buckley could have handled this matter as he pleased, it could have been ended simply by his walking away after telling Franks not to disturb O'Brien in his work. In assessing the matter, it must be taken into account that Franks was an employee for almost 10 years, she had an excellent work record, she had never been disciplined, and, more importantly, the managers candidly agreed that she was indeed a good waitress who did her work in good fashion. Moreover, management was aware that Franks had suffered from diabetes and was inclined at times to be "hyper." Admirably, the managers were not only aware of this condition but guided themselves accordingly, and apparently were solicitous of Franks in this regard. However, assuming she had been a little "hyper" in the final incident with Buckley, the question remains as to why their attitude towards her changed. This must be laid to the fact that she was the prime and indeed it appears, the only union protagonist and organizer on the premises and, of course, the observer at the election. Moreover, the whole incident was undoubtedly built up for these reasons and represented the culmination of Martin's threat contained in the discussion with Dee on the Saturday before. Martin's prediction became a fact since he had stated to Dee that if they did not get rid of Franks over the weekend, Buckley would do it on Monday, and so he did. I find, therefore, noting also that no evidence was produced of other waitresses being discharged for this type of alleged conduct, that the insubordination claimed by Buckley as the rationale for his action was merely a pretext.

Respondent has urged that Franks' discharge be analyzed in accordance with the Board's decision in *Wright Line*.[2] Under the theory of that line of cases, it is incumbent on the General Counsel to prove a prima facie case which has clearly been met by virtue of Franks' extensive union activities concerning which Respondent had knowledge. Thereafter, Respondent must go forward to prove a valid reason for the discharge. Having found that Respondent's contention of insubordination has been pretextual, I further find that the only remaining valid reason for discharge was Franks' union activities. Accordingly, I find that Respondent violated Section 8(a)(3) of the Act by its discharge of Franks.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to

[2] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discharged Victoria M. Franks in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that Respondent be ordered to make her whole for any loss of earnings and other benefits resulting from her discharge, by payment to her of a sum of money equal to the amount she normally would have earned as wages and other benefits from the date of her discharge to the date on which she was reinstated, less net earnings during that period. As noted, Franks has been reinstated, so the usual reinstatement remedy is not recommended. The amount of backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[3]

I shall also recommend that Respondent expunge from its records any reference to the unlawful discharge of Franks, and inform her that this will not be used as a basis for future personnel actions concerning her.[4]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by:

(a) Threatening employees with reduced benefits should they select the Union as their collective-bargaining representative.

(b) Threatening employees with the loss of the right to present grievances directly to management in order to discourage support for the Union.

(c) Threatening employees with loss of wage increases, or decreased wage increases, should they select the Union as their representative.

(d) Threatening discharge of employees in the presence of other employees.

(e) Harassing employees by making their job duties more onerous and difficult and overobserving them, because of their union activities.

4. Respondent violated Section 8(a)(3) and (1) of the Act by discharging Victoria M. Franks because of her union activities.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Bahama Joe's, Inc., Sanford, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with lesser benefits should they select Hotel, Motel, Restaurant Employees and Bartenders Union, Local 737, AFL-CIO, as their collective-bargaining representative.

(b) Threatening employees with loss of the right to present grievances directly to management in order to discourage their support of the Union.

(c) Threatening employees with loss of wages or lesser wage increases should they select the Union as their representative.

(d) Threatening to discharge employees in the presence of other employees.

(e) Harassing employees and making their jobs more onerous and overobserving them because of their union activities.

(f) Discharging employees, or otherwise discriminating against employees because of their union activities.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Make whole Victoria M. Franks for any loss of earnings or other benefits in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Expunge from its files any reference to the discharge of Victoria M. Franks, and notify her in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against her.

(d) Post at its Sanford, Florida facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable

[3] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[4] *Sterling Sugars*, 261 NLRB 472 (1982).

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.